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No. 94-590

In the Supreme Court of the United States

OCTOBER TERM, 1994

VERNONIA SCHOOL DISTRICT 47J, PETITIONER

v.

WAYNE ACTON AND JUDY ACTON, ETC.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether petitioner violates the Fourth Amendment by requiring students who wish to participate in interscholastic sports to agree to take suspicionless urine tests for alcohol and illegal drugs.

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INTEREST OF THE UNITED STATES

This case presents the question whether a school district may, consistently with the Fourth Amendment, conduct suspicionless drug testing of student athletes. Although education is primarily the responsibility of state and local governments, the federal government has a substantial interest in the question presented here. The federal government provides large amounts of money to support state and local drug-education and drug-prevention programs. Of particular relevance, Congress has authorized federal grants under the Drug-Free Schools and Communities Act of 1986 (1986 Act) to be used for, among other things, "non-discriminatory

random drug testing programs for students voluntarily participating in athletic activities." 20 U.S.C. 3192(d) (Supp. V 1993).[1] In addition, the federal government has a strong interest in preserving flexibility for school districts in designing programs and policies that will enable them to achieve the National Education Goals, one of which is to minimize student drug use and create an environment conducive to learning in the schools. Goals 2000: Educate America Act, Pub. L. No. 103-227, § 102(7), 108 Stat. 132-133 (1994). The United States participated as an amicus curiae in *New Jersey* v. *T.L.O.*, 469 U.S. 325 (1985), which addressed the application of the Fourth Amendment to searches of school students by school officials. Moreover, federal officials were parties to cases in this Court involving Fourth Amendment challenges to drug-testing programs for employees. See *Skinner* v. *Railway Labor Executives' Ass'n*, 489 U.S. 602 (1989); *National Treasury Employees Union* v. *Von Raab*, 489 U.S. 656 (1989).

[1] The Department of Education, which administers the 1986 Act, advises us that more than $390 million was appropriated under the Act for state and local education authorities for fiscal year 1993; the amount appropriated for fiscal year 1994 was more than $274 million. The Department of Education also advises us that petitioner has received yearly grants under the 1986 Act of approximately $7,500. In October, 1994, Congress enacted a reauthorization of the 1986 Act; the new Act takes effect in July, 1995. Improving America's Schools Act of 1994, Pub. L. No. 103-382, § 101, 108 Stat. 3672-3690. Although the new Act does not explicitly authorize the use of federal grants for random drug testing of student athletes, that use continues to be permitted under the new Act. See 108 Stat. 3682-3684.

STATEMENT

1. a. Vernonia, Oregon, is a logging town of about 3000 people located northwest of Portland. Petitioner, Vernonia School District 47J, runs two schools there: Washington Grade School and Vernonia High School. Pet. App. 2a, 77a. Until the early 1980s, discipline was not a major problem at the schools, and illegal drug use was limited to "'fringe' elements" among the students. *Id.* at 79a.

That situation changed between 1985 and 1989. During that period, the schools confronted a "marked increase in disciplinary problems, student drug use, and the glorification of drug culture." Pet. App. 2a. Drug paraphernalia was confiscated from students. *Id.* at 81a. Students smoked marijuana at a coffee shop across the street from the high school. Students boasted about their drug use, telling teachers that there was nothing the school could do about it. *Id.* at 80a-81a; see also Tr. 21, 26. Students formed organizations, such as the "Drug Cartel" and the "Big Elks," that glorified drug use. Pet. App. 4a. There was a threefold increase in classroom disruptions and disciplinary reports. *Id.* at 80a-81a, 86a.

The drug and discipline problems centered around the student athletes. Student athletes made up most of the membership of the "Big Elks," which distinguished itself by bizarre behavior that teachers believed could only be due to drug use. Tr. 129. Several student athletes were caught drinking alcohol in a bus after a game; others were caught stealing alcohol from a store after a track meet. Pet. App. 81a. A student wrestler hurt himself by failing to execute a basic safety maneuver at a wrestling meet. His coach attributed the injury to drug use

because the team had practiced the maneuver repeatedly and because the student's hotel room reeked of marijuana when the coach visited it on the morning after the meet. *Id.* at 81a-82a. The same coach testified that drug use was affecting some student football players by causing them to ignore or forget basic safety routines. *Id.* at 82a; see also Tr. 110-113.

School officials talked to parents and students, who confirmed that the increasing discipline problems were caused by the increasing student drug use. Further investigation showed that the leaders among the student drug users were the student athletes. Pet. App. 83a. That caused particular concern because school athletics "play a dominant role in the community and student athletes are well known and admired." *Id.* at 77a-78a.

School officials considered and tried several measures before adopting the drug-testing program at issue here. They held numerous, ongoing drug-education programs, which had no discernible effect. Pet. App. 84a-85a. On one occasion, they brought a drug-sniffing dog into one of the schools. *Id.* at 85a. They even considered "mass expulsion" of the offending students. *Id.* at 86a-87a.

In 1988, school officials began to consider adopting a drug-testing program. The program at issue here was implemented in the fall of 1989, after it had been endorsed at a meeting of parents and approved by the School Board and the Superintendent. Pet. App. 4a, 87a-88a.

b. Under petitioner's drug-testing program, a student who wishes to participate in interscholastic sports (which are held for grades 7 and above) must sign, and have his parents or guardians sign, a form consenting to the drug testing of the student. Each student athlete is tested for drugs before each sports season. In addition, 10% of the student athletes are tested each week of the

season based on a lottery system. Any student athlete who refuses to be tested may be suspended from the athletic program. Pet. App. 4a-5a, 88a-89a; Tr. 47.

The testing procedure during the season is essentially the same for male and female students at both the grade school and the high school. A student goes into a locker room, where he or she is given a cup and a vial by a teacher or coach of the student's gender. Male students go to a urinal and urinate into the cup, fully clothed and with their backs to the adult monitor; female students go into an enclosed toilet stall to produce their samples. The monitors are close enough to hear the student urinate. The student hands the cup to the monitor, who pours its contents into the vial. The student puts a lid on the vial; the monitor seals the vial with security tape; and they both sign and date the tape. A specimen control number is written on the tape; the vial is put into a plastic bag; and the bag is sealed. The student then completes a control form affirming that the sample is his or hers. Pet. App. 5a-6a, 89a-91a; Tr. 38, 73-75.

The urine samples go to Metrolab, a private laboratory in Portland. Metrolab tests them for alcohol, amphetamines, cocaine, and marijuana, with an accuracy rate of 99.94%. If a sample tests positive, Metrolab tests it again. Metrolab reports positive results to the school by telephone and in writing. Pet. App. 7a, 92a.

The school takes action only if a sample tests positive twice. In that event, the school meets with the student and his or her parents or guardians. At the meeting, the student is given a choice: If the student wishes to stay in the athletic program, he or she must agree to receive drug counselling and be tested every week for six weeks; otherwise, the student is suspended from the athletic program for the rest of that season and the following one.

The student has this choice both the first time and the second time that the student has a confirmed positive drug test. The third time a student tests positive for drugs, however, he or she is suspended from the athletic program for the rest of the season and the next two seasons. Pet. App. 7a-8a, 93a; Tr. 50-53.

Petitioner's written policy states that the drug-testing program "is not punitive." PX 1, at 2. Test results are available only to certain school officials; otherwise, they "remain confidential." Pet. App. 121a. Test results "may only be used to suspend the student from participation in the athletic program—test results are not disclosed to criminal authorities and may not be used as the basis for school disciplinary proceedings such as suspension or expulsions." *Id.* at 121a-122a.

At the end of the first school year in which the drug-testing program was implemented (1989-1990), the number of disciplinary referrals decreased to 50% of those for the previous year. Tr. 22, 43; see also Pet. App. 34a-36a. School officials attributed the decrease primarily to the drug-testing program. Tr. 44-45, 137; see also Pet. App. 34a.

c. In the fall of 1991, James Acton, a seventh-grader in the Washington Grade School, signed up for the football team. He also took the physical examination that petitioner requires (independently of the drug-testing program challenged here) of all students who wish to participate in interscholastic sports. As part of that exam, he provided a urine sample. Pet. App. 94a & n.2; Tr. 13-14. At the first football practice, he was given the consent form that had to be signed under petitioner's drug-testing program. James and his parents refused to sign it. Because of their refusal, James could not try out for the football team. *Id.* at 9a, 94a-95a; Tr. 7-9, 12-13.

2. James' parents, respondents here, brought this action against petitioner in the United States District Court for the District of Oregon, relying on 42 U.S.C. 1983. They claimed that petitioner's drug-testing program violates the Fourth Amendment of the United States Constitution and Article I, Section 9, of the Oregon Constitution. They sought declaratory and injunctive relief barring the program. Pet. App. 76a. After a bench trial, the district court entered judgment for petitioner, holding that the program comports with the Fourth Amendment and the cognate provision of Oregon's Constitution. *Id.* at 76a-142a.

To decide the Fourth Amendment issue, the district court "engage[d] in a balancing test." Pet. App. 113a-114a. Under that test, the court required petitioner to "demonstrate a 'compelling need' for the program" that outweighed the student's legitimate expectation of privacy. *Id.* at 114a. The court held that petitioner made that showing, based on the following determinations:

(1) drug use was threatening the physical safety of student athletes, *id.* at 115a-116a;

(2) student athletes are role models for other students, including with regard to the use (or non-use) of drugs, *id.* at 116a-117a;

(3) the drug-testing program is aimed at the one activity—participation in interscholastic sports—that causes it to have the greatest deterrent effect, *id.* at 117a;

(4) student athletes have diminished expectations of privacy, compared to other students, because they are required to have physical examinations, and they

have little privacy in the locker room, *id.* at 117a-118a;

(5) the drug-testing program was adopted, not as a "fishing expedition" or a "moral crusade," but instead "for the limited purposes of addressing student safety in athletic programs and, ultimately, maintaining discipline in the classrooms," *id.* at 118a-119a;

(6) "the school district considered and actually tried several alternative methods of dealing with the increase in drug and alcohol related disciplinary problems" before turning to drug testing, *id.* at 119a-120a;

(7) petitioner took "significant steps" to limit the intrusiveness of the testing, in that students are not watched when they give urine samples, the samples are tested only for alcohol and certain illegal drugs, and the test results are highly accurate, confidential, and used only to determine eligibility for interscholastic sports, *id.* at 121a-122a; and

(8) the drug-testing program "limits the degree of discretion that may be exercised by coaches and school administrators," since it provides for testing of all student athletes at the beginning of each season and on a lottery basis during the season, *id.* at 122a.

The district court engaged in a similar analysis to conclude that the drug-testing program satisfies Article I, Section 9, of the Oregon Constitution. Pet. App. 138a-142a.

3. The United States Court of Appeals for the Ninth Circuit reversed, holding that petitioner's drug-testing

program "is invalid under the Fourth Amendment," and, consequently, that "Oregon would find it invalid under Article I, Section 9, of its Constitution." Pet. App. 65a. (The latter holding followed from the first, the court of appeals determined, because Oregon courts would construe the state constitutional provision to provide at least as much protection as does the Fourth Amendment in this case. *Id.* at 18a; see also *id.* at 66a (Reinhardt, J., concurring).)

Before addressing respondents' constitutional challenges, the court of appeals rejected their challenge to the district court's findings of fact (Pet. App. 19a-20a):

> [The record] demonstrates that both the administrators and the faculty beheld instances of drug use and glorification. They also perceived actions of athletes and others that were so far out of the norm that use of drugs was a logical inference. Besides that, they were told of incidents by others who were concerned and who had no reason to lie.

The court of appeals analyzed the constitutionality of the program in light of four factors that it derived from *Delaware* v. *Prouse*, 440 U.S. 648 (1979) (Pet. App. 31a):

> (1) the importance of the governmental interests; (2) the degree of physical and psychological intrusion on the citizen's rights; (3) the amount of discretion the procedure vests in individual officials; and (4) the efficiency of the procedure.

The court determined that the third and fourth factors "weigh in favor of the [program's] constitutionality." *Id.* at 34a. As to the third factor, the court observed that the program "vests no discretion in any District officials." *Id.* at 37a. As to the fourth factor, the court observed that "[e]very teacher who testified had noticed an im-

provement in discipline, a reduction in disciplinary referrals, and a decrease in drug use and the glorification of drug culture since the [program] was implemented." *Id.* at 34a.

The court of appeals nonetheless determined that the first and second factors were "dispositive" of the drug-testing program's unconstitutionality. Pet. App. 37a. In the court's estimation, the school's goals of protecting student athletes and deterring drug use by all students are "worthy" but do not concern "the type of potential disaster that has caused [this] Court or [the Ninth Circuit] to find a governmental interest compelling enough to permit suspicionless testing." *Id.* at 56a, 58a. The court also found that the privacy interests of students covered by petitioner's program are not "much less robust than the interests of people in general." *Id.* at 53a.

SUMMARY OF ARGUMENT

I. Petitioner's drug-testing program should be reviewed under the same balancing approach that this Court used in *Skinner* v. *Railway Labor Executives' Ass'n*, 489 U.S. 602 (1989), and *National Treasury Employees Union* v. *Von Raab*, 489 U.S. 656 (1989), to review Fourth Amendment challenges to suspicionless drug-testing programs. In *Skinner* and *Von Raab*, the Court upheld suspicionless drug-testing programs by balancing the individual's legitimate privacy interests against the government's interests. The Court found that the particular programs at issue there passed the balancing test because they (1) served "compelling" governmental interests that would be jeopardized if individualized suspicion were required; (2) posed only a limited threat to the legitimate expectations of privacy

of those covered by the programs; and (3) provided safeguards to limit the discretion of the officers administering the programs.

II. When reviewed under the balancing approach of *Skinner* and *Von Raab*, petitioner's drug-testing program satisfies the Fourth Amendment.

First, petitioner's program serves compelling governmental interests: the protection of student athletes from physical injury and the deterrence of drug use by students generally. The State's interest in "the education and training of young people" is "compelling." *New Jersey* v. *T.L.O.*, 469 U.S. 325, 350 (1985) (Powell, J., concurring). Petitioner showed that it could not effectively educate its students in the wake of the drug and discipline problems that developed in the mid-1980s without a drug-prevention program that included, as a reasonable component thereof, a program of drug-testing for athletes. Petitioner also showed that its interests could not have been served by drug testing based only upon individualized suspicion.

Second, petitioner's program poses only a limited threat to the legitimate privacy interests of the students covered by it. "[S]tudents within the school environment have a lesser expectation of privacy than members of the population generally." *T.L.O.*, 469 U.S. at 348 (Powell, J., concurring). Moreover, petitioner showed that the student athletes covered by its program have lesser legitimate expectations of privacy with regard to physical examinations than do students in general.

Finally, petitioner's program leaves little room for discretion by "officials in the field." It provides for all student athletes to be tested at the start of each season and for student athletes to be tested on a lottery basis during the season. That procedure minimizes the risk of

random or arbitrary violations of the Fourth Amendment by individual government officials.

ARGUMENT

PETITIONER'S PROGRAM FOR THE SUSPICIONLESS DRUG TESTING OF STUDENT ATHLETES COMPORTS WITH THE FOURTH AMENDMENT

Petitioner's drug-testing program plainly implicates the Fourth Amendment (as made applicable to the States by the Fourteenth Amendment, see *Mapp* v. *Ohio*, 367 U.S. 643 (1961)). That is because petitioner's program entails "the collection and testing of urine," which "must be deemed searches under the Fourth Amendment." *Skinner* v. *Railway Labor Executives' Ass'n*, 489 U.S. 602, 617 (1989); see *National Treasury Employees Union* v. *Von Raab*, 489 U.S. 656, 665 (1989). In *Skinner* and *Von Raab*, this Court upheld, against Fourth Amendment challenges, programs for the suspicionless drug testing of certain groups of employees. We show in Part I below that the approach of *Skinner* and *Von Raab* should be used to review respondents' Fourth Amendment challenge to petitioner's program. We show in Part II below that, under that approach, petitioner's program comports with the Fourth Amendment.

I. Petitioner's Drug-Testing Program Should Be Reviewed Under The Balancing Approach of *Skinner* And *Von Raab*

"Except in certain well-defined circumstances," *Skinner*, 489 U.S. at 619, the Fourth Amendment requires a search to "be supported * * * by a warrant issued upon probable cause," *Von Raab*, 489 U.S. at 665. In *Skinner* and *Von Raab*, this Court held that "where a Fourth Amendment intrusion serves special governmental needs, beyond the normal need for law enforcement, it is necessary to balance the individual's privacy expectations against the Government's interests to determine whether it is impractical to require a warrant or some level of individualized suspicion in the particular context." *Von Raab*, 489 U.S. at 665-666; see *Skinner*, 489 U.S. at 624. The Court in *Skinner* and *Von Raab* further held that the programs before it were reasonable under a balancing test to the extent that they (1) served compelling governmental interests that would be jeopardized if individualized suspicion were required; (2) posed only a limited threat to the legitimate expectations of privacy of those covered by the programs; and (3) had safeguards to prevent random or arbitrary violations of the Fourth Amendment by government officials. Petitioner's program is reasonable on the same grounds.

The Court in *Skinner* and *Von Raab* proceeded in two stages. First, the Court held that the programs before it did not automatically violate the Fourth Amendment merely because they provided for searches without warrants or probable cause. See *Skinner*, 489 U.S. at 618-624; *Von Raab*, 489 U.S. at 665-668. The Court based that holding on the existence of "special needs, beyond the normal need for law enforcement," that "ma[d]e the warrant and probable-cause requirement impracticable." *Skinner*, 489 U.S. at 619 (quoting *New Jersey* v. *T.L.O.*, 469 U.S. 325, 351 (1985) (Blackmun, J., concurring in the judgment); *Von Raab*, 489 U.S. at 665-666.

The Court in *Skinner* and *Von Raab* then turned to the question whether the programs before it satisfied the reasonableness requirement of the Fourth Amendment. To decide that question, the Court balanced the governmental interests served by the programs against the legitimate privacy interests of those covered by the programs. In holding that the governmental interests

outweighed the individual interests, the Court made three determinations.

First, the Court in *Skinner* and *Von Raab* determined that the drug-testing programs before it served "compelling" governmental interests that would be jeopardized if searches had to be conducted based only on individualized suspicion. Thus, in *Skinner*, the Court determined that "the Government interest in testing without a showing of individualized suspicion is compelling" with respect to railroad employees involved in train accidents and certain violations of train-operating rules. 489 U.S. at 628; see also *id.* at 609-611, 633. The Court reasoned that those employees "can cause great human loss before any signs of impairment become noticeable." *Id.* at 628. In *Von Raab*, the Court determined that a program for the drug testing of U.S. Customs Service employees who are directly involved in drug interdiction or who carry firearms serves the government's "compelling interests in safeguarding our borders and the public safety." 489 U.S. at 677; see also *id.* at 660-661.

Second, the Court in *Skinner* and *Von Raab* determined that the programs did not unduly interfere with the legitimate privacy expectations of those covered by the programs. The Court recognized that urine tests, which were required by both programs at issue, could raise significant privacy concerns in most contexts. *Skinner*, 489 U.S. at 626; *Von Raab*, 489 U.S. at 671. But the Court held that those concerns were minimized in each case by two factors that have particular relevance to the present case: (1) the program was designed "to reduce the intrusiveness of the collection process," *Skinner*, 489 U.S. at 626; see *Von Raab*, 489 U.S. at 672 n.2; and (2) the covered employees had diminished expectations of privacy compared to the population in general, see *Skinner*, 489 U.S at 627; *Von Raab*, 489 U.S. at 672.

Finally, the Court in *Skinner* and *Von Raab* determined that the standards for testing prescribed by the programs before it minimized the risk of arbitrary enforcement by individual government officials. Thus, in *Skinner*, the Court found it significant that the drug-testing program for railroad employees posed no risk of "random or arbitrary" enforcement by government agents because of "the standardized nature of the tests and the minimal discretion vested in those charged with administering the program." 489 U.S. at 622. Similarly, in *Von Raab*, the Court determined that, because of the criteria for testing specified in the program administered by the U.S. Customs Service, a covered employee "is simply not subject to the discretion of the official in the field." 489 U.S. at 667 (internal quotation marks omitted). See also *New Jersey* v. *T.L.O.*, 469 U.S. 325, 342 n.8 (1985) ("Exceptions to the requirement of individualized suspicion are generally appropriate only where the privacy interests implicated by a search are minimal and where 'other safeguards' are available 'to assure that the individual's reasonable expectation of privacy is not "subject to the discretion of the official in the field."'" (quoting *Delaware* v. *Prouse*, 440 U.S. 648, 654-655 (1979)).

II. Petitioner's Drug-Testing Program Is Reasonable Under The Balancing Approach of *Skinner* And *Von Raab*

We discussed above the standard that this Court applied in upholding suspicionless drug-testing programs for employees under a balancing of interests in *Skinner* and *Von Raab*. See pp. 12-15, *supra*. A suspicionless drug-testing program for students should not be

subject to a more stringent standard.[2] And because petitioner's program satisfies the standard applied in *Skinner* and *Von Raab*, this case does not provide an occasion for addressing petitioner's contention that a less stringent standard applies to suspicionless drug-testing programs for students. See Pet. 35-37; see also Pet. 38.

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[2] In *New Jersey* v. *T.L.O.*, *supra*, the Court held that "school officials need not obtain a warrant before searching a student who is under their authority," and that such searches do not need to "be based on probable cause to believe that the subject of the search has violated or is violating the law." 469 U.S. at 340, 341. This Court has subsequently made clear that those holdings were based on the existence of "special needs" of the same sort as were found to exist in *Skinner* and *Von Raab*. See *T.L.O.*, 469 U.S. at 351 (Blackmun, J., concurring in the judgment) ("Only in those exceptional circumstances in which special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable, is a court entitled to substitute its balancing of interests for that of the Framers."); see also *Skinner*, 489 U.S. at 619 (quoting concurring opinion of Blackmun, J., in *T.L.O.*); *Von Raab*, 489 U.S. at 665-666 (paraphrasing same); *Griffin* v. *Wisconsin*, 483 U.S. 868, 873 (1987) (quoting same); *New York* v. *Burger*, 482 U.S. 691, 702 (1987) (quoting same); *O'Connor* v. *Ortega*, 480 U.S. 709, 720 (1987) (plurality opinion) (quoting same). Under *T.L.O.*, because petitioner's drug-testing program serves "special needs," it is not per se invalid on the grounds that it permits searches without warrants or probable cause. By the same token, the existence of such "special needs" does not mean that petitioner's program necessarily comports with the Fourth Amendment. It must still be determined whether the program satisfies the Fourth Amendment's reasonableness requirement. That determination should be made under the balancing approach of *Skinner* and *Von Raab*.

A. Petitioner's drug-testing program serves compelling governmental interests that would be jeopardized if individualized suspicion were required

1. "Education 'is perhaps the most important function' of government." *T.L.O.*, 469 U.S. at 353 (Blackmun, J., concurring in the judgment) (quoting *Brown* v. *Board of Education*, 347 U.S. 483, 493 (1954)). Consequently, "[a] State has a compelling interest in assuring that the schools" effectively perform that function. *T.L.O.*, 469 U.S. at 350 (Powell, J., concurring). Petitioner showed that it could not effectively educate its students unless it undertook suspicionless drug testing as part of a broader drug-prevention program. Petitioner also showed that the interests served by that program would be jeopardized if individualized suspicion were required. Under those circumstances, petitioner demonstrated that its program was supported by compelling governmental interests.

A school cannot effectively educate its students when a significant number of them uses alcohol or illegal drugs on a regular basis, for three reasons. First, the use of drugs and alcohol "significantly impede[s] the learning process" of the individual user. 20 U.S.C. 3172(3); Improving America's Schools Act of 1994, Pub. L. No. 103-382, § 101, 108 Stat. 3672 ("Findings"; Section 4002(2)).[3] Second, student drug users may cause violence

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[3] See also 1 National Institute on Drug Abuse, *National Survey Results on Drug Use from the Monitoring the Future Study, 1975-1993*, at 64-65 (1994) [hereinafter *National Survey Results*] (discussing differences in rates of drug use between college-bound and non-college-bound students); 1 Core Institute, Southern Illinois Univ., *Alcohol and Drugs on American College Campuses* 24, Table

and lesser disruptions that keep other students from learning. See 108 Stat. 3672-3690 (amending Drug-Free Schools and Communities Act of 1986, 20 U.S.C. 3171 *et seq.*, to authorize federal funding for violence, as well as drug, prevention programs).[4] Third, as more students begin to use drugs, more are tempted to begin using them, because of peer pressure.[5]

Petitioner proved that each of these factors was operative here. Petitioner showed that in the mid-1980s its schools faced a dramatic erosion of student discipline. As the district court found (Pet. App. 80a-81a):

> Outbursts of profane language during class, rude and obscene statements directed at other students, and a general flagrant attitude that there was nothing the school could do about their conduct or their use of drugs or alcohol typified a usual day.

2-11 (1989-1991) (showing inverse relationship between number of drinks of alcohol per week and college students' grade point average).

[4] The House Committee Report on the 1994 legislation explained (H.R. Rep. No. 425, 103d Cong., 2d Sess. 29 (1994)):

> Drugs and violence are related in many ways. Some drugs affect the user in ways that make violence more likely. Some drug users commit violent acts to get money to buy drugs. Violence is common in drug trafficking as a result of disagreements about transactions and because traffickers use violence as a way to gain competitive advantage.

See also S. Greenbaum, *Drugs, Delinquency, and Other Data* in 2 Office of Juvenile Justice and Delinquency Prevention, Office of Justice Programs, U.S. Dep't of Justice, *Juvenile Justice* 3-4 (Spring/Summer 1994).

[5] See 1 *National Survey Results* 228 ("It is generally acknowledged that much of youthful drug use is initiated through a peer social-learning process.").

The district court also found that the dramatic increase in discipline problems stemmed from an equally dramatic increase in drug and alcohol use by students (*ibid.*):

> All of the teachers who testified at trial expressed how appalled and helpless they felt as students increasingly expressed their attraction to, and vocal defense of, the use of drugs. Students boasted about drug use and regaled one another with stories of the latest "high" or "party." * * * Organizations formed within the student drug culture taking such names as the "Big Elks" or the "Drug Cartel." * * * Drug paraphernalia was confiscated on schools grounds, and open use of drugs was observed at a local cafe across the street from the high school.

The district court further found that, from petitioner's investigation, it "became clear that the leaders of this [drug] activity were also the leading student athletes." *Id.* at 83a. The drug activity was, the district court found, endangering not only the physical safety of student athletes who used drugs but also the welfare of their peers, for whom student athletes served as role models, including with respect to drug use. *Id.* at 83a-84a, 116a-117a.

Respondents' challenge to the district court's findings, which they renew here (Br. in Opp. 4-16), was rejected by the court of appeals (Pet. App. 18a-21a); in any event, it "evinces an unduly narrow view of the context in which [petitioner's] testing program was implemented." *Von Raab*, 489 U.S. at 674. Respondents primarily dispute that there was an "epidemic" of drug use in Vernonia's schools. Br. in Opp. 4-7. "Epidemic" or not, there is no question that drug use in Vernonia's schools was substantial; in addition, petitioner's program

was designed to deter students from taking drugs in the first place as much as it was designed to detect those who were already taking drugs. Cf. *Von Raab*, 489 U.S. at 674 ("The Service's program is designed to prevent the promotion of drug users to sensitive positions as much as it is designed to detect those employees who use drugs."). In light of that purpose and the fact that petitioner's program covers only student athletes, it was sufficient for petitioner to show that a significant portion of the student body was using drugs or alcohol on a regular basis, to the severe detriment of student discipline on a school-wide basis; that student drug use was most acute among the student athletes, whose drug use exposed them to increased risk of physical injury; and that the student athletes served as role models for other students, such that the use of drugs or alcohol by a significant portion of the student athletes reasonably could be expected to encourage drug use by other students.

Moreover, the adoption of the drug-testing program was not a precipitous response to the drug problem. School officials first investigated the problem by talking to parents, teachers, and coaches. They then conducted ongoing drug-education programs. On one occasion they brought a drug-sniffing dog into the school, and they considered mass expulsion. It was only after substantial drug use continued that they considered drug testing. Then, too, they proceeded cautiously and methodically, by investigating drug-testing programs in other schools and obtaining legal advice. Pet. App. 85a-88a. The program that was instituted was a measured response to a demonstrated problem, not a "fishing expedition" or a "moral crusade." *Id.* at 118a.

The Ninth Circuit deemed the goals underlying petitioner's program to be "worthy," but not "compelling." Pet. App. 56a-58a. The court considered the goals less than compelling because it did not believe that the drug problem in Vernonia schools posed a "terrible threat to safety" such as "some shooting, some explosion, some crash of train, truck, or aircraft, or some breach of top secret national security." *Id.* at 58a. That belief, in turn, appeared to be based on the notion that a student who uses drugs hurts only him- or herself.

As discussed above, the record refutes the notion that the harm of substantial drug use in schools is limited to the individual users. Moreover, petitioner's experience in that regard is consistent with the national data. Cf. *Von Raab*, 489 U.S. at 674 (in assessing governmental interest, Court notes that "drug abuse is one of the most serious problems confronting our society today"). In addition to the immediate destructive effects of drug use on the educational process, the Department of Education advises us that there were about 50 homicides in the nation's schools last year. In addition, "[a]bout 3 million thefts and violent crimes occur on or near a school campus each year, nearly 16,000 incidents per school day." H.R. Rep. No. 425, 103d Cong., 2d Sess. 29 (1994). Experts believe that many, if not most, of those incidents are drug-related.[6]

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[6] In 1994, the National School Boards Association reported that, according to its recent survey of 729 school districts and numerous school leaders, 45% of the incidents of violence in the schools during the 1992-1993 school year were drug-related. See *Violence in the Schools: How America's School Boards Are Safeguarding Our Children* 6 (1993). The Bureau of Justice Statistics within the Department of Justice reports that, according to the National Crime Survey, 37% of all violent crimes committed against young

2. Petitioner showed that its drug-prevention program would be jeopardized by requiring individualized suspicion for drug testing, for the same reasons that obtained in *Skinner*.

Here, as in *Skinner*, the evidence showed that it is not always possible to detect the signs of alcohol and drug use. See Pet. App. 120a (crediting testimony that "visual observations (even by professionals) are simply not reliable indicators of whether [a] student may have consumed alcohol or drugs"); cf. *Skinner*, 489 U.S. at 628-629. Thus, like the program at issue in *Skinner*, petitioner's program has a greater deterrent effect than would a program based on individualized suspicion, because it increases the likelihood of detection. Cf. *id.* at 630.

Moreover, petitioner's program, like the program at issue in *Skinner*, "suppl[ies] an effective means of deterring" individuals covered by the program "from using controlled substances or alcohol in the first place." 469 U.S. at 629. The need to deter a person's "first use" of drugs is especially compelling in the case of students. Both the record in this case and studies confirm that a person is particularly vulnerable to the "first use" of drugs and alcohol in his or her middle and high school years. Tr. 43; Office of National Drug Control Policy, Executive Office of the President, *National Drug Control Strategy: Reclaiming Our Communities from Drugs and Violence* 32 (Feb. 1994).

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teenagers occur at school, and about one-third of all victims of violent crime perceived the offender to have been under the influence of drugs or alcohol, or both, at the time of the offense. See *Teenage Victims: A National Crime Survey Report* 5, 8 (May 1991).

B. Petitioner's drug-testing program poses only a limited threat to the legitimate privacy interests of students covered by the program

The legitimate privacy expectations implicated by petitioner's program are no greater than those implicated by the programs upheld in *Skinner* and *Von Raab*.

Like the programs before this Court in *Skinner* and *Von Raab*, petitioner's program has features that "significantly minimize the program's intrusion on privacy interests." *Von Raab*, 489 U.S. at 672 n.2. Testing under petitioner's program is predictable: Students know that, if they decide to participate in interscholastic sports, they will be tested at the beginning of the season and may be tested during the season. Cf. *ibid.*; *Skinner*, 489 U.S. at 609. Moreover, here, as in *Skinner* and *Von Raab*, "[t]here is no direct observation of the act of urination," *Von Raab*, 489 U.S. at 673 n.2; see *Skinner*, 489 U.S at 626. And here, as the Court found in *Von Raab*, "urine samples may be examined only for specified drugs," and the results of the testing are highly accurate. 489 U.S. at 673 n.2. Indeed, the only significant difference between petitioner's program and those in *Skinner* and *Von Raab* is that under petitioner's program test results may not be used for criminal prosecution under any circumstances. Pet. App. 121a-122a; cf. *Skinner*, 489 U.S. at 621 n.5; *Von Raab*, 489 U.S. at 666. That difference, of course, makes petitioner's program less intrusive than those upheld in *Skinner* and *Von Raab*.

The Ninth Circuit erred in holding that the legitimate privacy interests of student athletes are not "much less

robust" than those of the general adult population. Pet. App. 53a. The Court in *T.L.O.* upheld the search of a student by school officials based on a standard lower than probable cause. *T.L.O.* thus establishes that, for Fourth Amendment purposes, "students within the school environment have a lesser expectation of privacy than members of the population generally." 469 U.S. at 348 (Powell, J., concurring); cf. *Schall* v. *Martin*, 467 U.S. 253, 265 (1984).

Moreover, the student athletes covered by petitioner's program have lesser expectations of privacy, with respect to urine tests, than members of the student population generally. Student athletes in Vernonia were required to take urine tests as part of physical examinations that were required independently of the drug-testing program. Pet. App. 94a & n.2; Tr. 13-14. In addition, the locker rooms in which student athletes changed clothes for sports afforded little privacy. Petitioner's program used these same locker rooms for collection of the required urine samples. Tr. 39-43, 75-76, 121-123, 126.

C. Petitioner's drug-testing program has safeguards to prevent random or arbitrary searches by individual officials

The parties and the courts below say that petitioner's program allows "random" drug testing. See, *e.g.*, Pet. i; Pet. App. 1a. The program is not "random," however, in the pejorative sense that this Court has sometimes used that word in Fourth Amendment analysis. On the contrary, the "randomness" of petitioner's program results from its having procedures for drug testing that leave little room for arbitrary searches by individual government officials. The procedures thus prevent the

singling out of any particular student or group of students for drug testing, and they therefore buttress the reasonableness of the program.

The warrant and probable-cause requirements of the Fourth Amendment function as safeguards against "the random or arbitrary acts of government agents." *Skinner*, 489 U.S. at 622; see, *e.g.*, *T.L.O.*, 469 U.S. at 335; *Prouse*, 440 U.S. at 653-655; *Camara* v. *Municipal Court*, 387 U.S. 523, 528 (1967). When neither a warrant nor individualized suspicion is required for a search or seizure, "other safeguards" are required "to assure that the individual's reasonable expectation of privacy is not 'subject to the discretion of the official in the field.'" *Prouse*, 440 U.S. at 655 (quoting *Camara*, 387 U.S. at 532); *T.L.O.*, 469 U.S. at 342 n.8. In the absence of safeguards against abuses of discretion, a program allowing warrantless, suspicionless searches or seizures violates the Fourth Amendment. Compare *Prouse*, 440 U.S. at 655, 661 with *Michigan Dep't of State Police* v. *Sitz*, 496 U.S. 444, 454-455 (1990).

Petitioner's program has safeguards against "random or arbitrary" searches by school officials. Every student athlete must be tested at the beginning of every season and is subject to testing during the season on a lottery basis. See p. 4, *supra*. As a result, the program leaves virtually no discretion to the "official in the field." See Pet. App. 37a; cf. *Skinner*, 489 U.S. at 622; *Von Raab*, 489 U.S. at 667.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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